

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CEDAR PARK ASSEMBLY OF GOD OF
KIRKLAND, WASHINGTON,

Plaintiff,

v.

MYRON “MIKE” KREIDLER, et al.,

Defendants.

NO. 3:19-cv-05181-BHS

DEFENDANTS’ RESPONSE TO
PLAINTIFF’S MOTION FOR LEAVE
TO FILE SUPPLEMENTAL VERIFIED
COMPLAINT

NOTED: OCTOBER 18, 2019

I. INTRODUCTION

Plaintiff Cedar Park Assembly of God of Kirkland, Washington (Cedar Park) seeks leave to supplement its Second Amended Complaint by adding three paragraphs alleging that Cedar Park purchased a health plan effective September 1, 2019, from an insurance carrier, Kaiser Permanente, that did not include an accommodation for Cedar Park’s religious beliefs. The Court should deny the Motion because the proposed supplementations are futile.

Once again, Cedar Park’s proposed supplementations do not change its claims for relief or its theory of the case. The amendments conform the complaint to the arguments Cedar Park has made in its renewed motion for preliminary injunction. Since the amendments add no new material facts, Cedar Park continues to lack standing, its proposed claims are not ripe, and under the doctrine of primary jurisdiction, the Court should allow the Insurance Commissioner to complete his rulemaking process. In addition, Cedar Park’s supplementations fail to cure the key

1 deficiency in its legal claims—that there is no factual or legal basis to conclude that SSB 6219
2 and RCW 48.43.065 will require it to pay for insurance coverage for services to which it objects.

3 Cedar Park’s claims would fail even if the Court granted leave to file the supplemental
4 complaint. Cedar Park’s motion should be denied.

5 II. FACTS

6 Cedar Park seeks to supplement its complaint to add three paragraphs. Those paragraphs
7 would allege that its insurance carrier, Kaiser Permanente, on August 14, 2019, informed Cedar
8 Park that it did not offer a plan that did not cover abortion services. Dkt. # 52-1 at ¶¶ 48.1-48.3.
9 Kaiser Permanente has stated that it will not provide abortion exclusions to fully insured groups.
10 *Id.* at ¶ 48.2. Cedar Park renewed its plan anyway. *Id.* at ¶ 48.1. Kaiser Permanente will change
the plan mid-year to eliminate coverage for abortion services if SB 6219 is enjoined. *Id.* at 48.3.

11 The supplementation also indirectly alleges an incorrect legal analysis that
12 RCW 48.43.065 allows Cedar Park to refuse to provide coverage for abortion or “abortifacient
13 contraceptives” while still allowing the insurer to charge Cedar Park a separate premium or fee
for the objectionable coverage. *Id.* at ¶ 48.2.

14 Throughout this litigation, Washington has made four main arguments: (1) Cedar Park
15 had not suffered an injury in fact; (2) its claims were not ripe; (3) the Complaint should be
16 dismissed under the primary jurisdiction doctrine; and (4) Cedar Park failed to state a claim upon
17 which relief could be granted. Dkt. # 25. In prior briefing explaining why those arguments are
18 correct, Washington has highlighted the fatal problems with Cedar Park’s allegations:

19 Cedar Park nowhere alleges that: (1) it attempted to purchase a new health care
20 plan or to renew its current plan in a way that excludes coverage of abortion or
21 abortifacient contraceptives; (2) such a plan is unavailable because of SSB 6219;
22 (3) the Insurance Commissioner denied health plans that exclude coverage of
abortion or contraceptives it views as “abortifacient” on religious grounds; (4) a
carrier in the Washington market refused to sell them a plan consistent with their
religious objections; and (5) the Insurance Commissioner or Governor directed
carriers to ignore or reject religious objections to services required by SSB 6219.

23 Dkt. # 32 at 2.
24

1 In dismissing Cedar Park’s first amended complaint, the Court agreed that there were
 2 these deficiencies. The Court nonetheless granted Cedar Park leave to file its second amended
 3 complaint for the sole purpose to flesh out an allegation that RCW 48.43.065 discriminates
 4 between religious insurance carriers, providers, and facilities and religious employers. Dkt. # 45.
 5 While the supplementations address a few of those factual deficiencies, they do not address them
 6 all. And the supplementations do not address the limited issue that this Court allowed to proceed.

7 III. ARGUMENT

8 A. Legal Standards

9 Under Fed. R. Civ. P. 15(d), “the court may, on just terms, permit a party to serve a
 10 supplemental pleading setting out any transaction, occurrence, or event that happened after the
 11 date of the pleading to be supplemented.” The legal standard on a motion to supplement under
 12 Rule 15(d) is the same as for amending a pleading under Rule 15(a). *See Glatt v. Chicago Park*
 13 *Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). “[L]eave need not be granted where the amendment of
 14 the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes
 15 an exercise in futility, or creates undue delay.” *Asco Props., Inc v. Mobil Oil Co.*, 866 F.2d 1149,
 16 1160 (9th Cir. 1989). The Court should also consider whether permitting the supplemental
 17 pleading will “serve to promote judicial efficiency.” *Planned Parenthood of So. Arizona v.*
Neely, 130 F.3d 400, 402 (9th Cir. 1997).

18 Where “amendment would not cure the deficiencies in the complaint,” leave to amend or
 19 supplement should be denied. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 297 (9th Cir. 1990). A
 20 “district court does not err in denying leave to amend where the amendment would be futile.”
 21 *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 655-56 (9th Cir. 2017). An amendment or
 22 supplementation is futile when “no set of facts can be proved under the amendment to the
 23 pleadings that would constitute a valid and sufficient claim or defense.” *Miller v. Rykoff-Sexton,*
 24 *Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

B. Leave to Supplement Is Futile Because Cedar Park's Claims Are Non-Justiciable

Cedar Park's proposed supplementations fail to cure its fatal justiciability problems. None of the proposed additions allege that Cedar Park has suffered an injury in fact because of the Defendants' actions. The proposed supplementations allege only that an insurance carrier did not offer a plan consistent with its religious beliefs. They supplementations do not show that the Insurance Commissioner refuse to approve such a plan because of SSB 6219. The reality is that the Insurance Commissioner has approved health plans that accommodate health plan purchasers' religious beliefs. *See* Dkt. # 54-1. The supplementations do not allege that Cedar Park's desired plan is unavailable in the market.

Cedar Park's proposed supplementations hint at a legal argument that RCW 48.43.065 allows an insurer to charge Cedar Park a separate premium or fee for the coverage to which it objects. Dkt. # 52-1 at ¶ 48.2. But RCW 48.43.065 includes no such language. As explained in Defendants' opposition to Cedar Park's renewed motion for preliminary injunction and renewed motion to dismiss, Cedar Park misapprehends how the insurance industry handles premiums. Dkt. # 55-1 at 9-10. Premium payments secure the promises that the services covered by a health plan will be paid—they cannot be characterized as payments for specific services. As explained throughout Defendants' briefs, when there is objectionable coverage, there are options for the carrier to pay for the services that do not rely on the premiums, including paying for the services from overhead and using a third party foundation.

Granting leave to supplement the complaint would be futile because Cedar Park still has suffered no injury in fact, its claims are not redressable, and the primary jurisdiction doctrine counsels in favor of first allowing the Insurance Commissioner to seek to harmonize SSB 6219 with the religious exemption in RCW 48.43.065. Since the proposed supplementations would still render the complaint subject to dismissal, the Court should deny Cedar Park's motion.

C. Leave to Amend Is Futile Because Cedar Park's Claims Fail as a Matter of Law

The proposed supplementations do not change the claims asserted by Cedar Park, and those claims fail as a matter of law. The proposed supplementations simply add irrelevant facts

1 to the flawed legal arguments Cedar Park has already made, thrice. It would be futile to allow
2 the supplementations, where they add nothing to the merits of Cedar Park's deficient legal
3 claims.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Plaintiff's Motion for Leave to File Supplemental Verified
6 Complaint should be denied.

7 DATED this 14th day of October, 2019.

8 ROBERT W. FERGUSON
9 Attorney General

10 /s/Paul M. Crisalli

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to the following:

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DATED this 14th day of October, 2019, at Seattle, Washington.

/s/ Paul M. Crisalli

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